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In The

Supreme Court of the United States

October Term, 1983

No. 83 - 208

VIRGIL E. TOMPKINS, Individually and as District Superintendent of Liverpool Central School District, JAMES JOHNSON, Individually and as Acting Superintendent of Liverpool Central School District, DENNIS JONES, Individually and as Coordinator of Personnel of Liverpool Central School District, DR. PAUL DAY, Individually and as Chief Medical Inspector for the Liverpool Central School District, F. ROBERT KOLCH, Individually and as Clerk of the Board of Education of the Liverpool Central School District, ARTHUR D. LITTLE, BRUCE C. VOGT, EMILIO CHASSE, DORIS ANN CONNOR, DAVID A. FILES, MARIE HARTWELL, RICHARD J. HAYKO, TONI ANNE MORRIS, LLOYD J. SPAFFORD, as Individuals and as Members of the Board of Education of the Liverpool Central School District, THE BOARD OF EDUCATION OF THE LIVERPOOL CENTRAL SCHOOL DISTRICT, Liverpool, New York, and ARNOLD DETTOR, as Hearing Officer appointed pursuant to New York State Education Law,

Petitioners,

v.

LORRAINE GARGIUL,

Respondent.

RESPONSE TO A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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TABLE OF CONTENTS

Page

Questions Presented 1

1. Whether Principles Of Res Judicata Bar A Claim Where No Final Judgment On The Merits Of The Case Was Obtained From A Court Of Competent Jurisdiction? 1

2. Whether Certiorari Should Be Denied Because New York Education Law Sec. 913, As Interpreted, Violates Substantive Due Process As It Arbitrary And Capricious 1

3. Whether A Tenured Female Teacher's Fundamental Right To Privacy Is Violated Where No Compelling State Interest Is Served By Requiring The Respondent To Undergo Physical Examination By A Male Medical Inspector.....2

Statement Of The Case 2

Point I - Principles Of Res Judicata Do Not Bar A Claim Where No Final Judgment On The Merits Of The Case Was Obtained 3

Point II - Certiorari Should Be Denied Because New York Education Law Sec. 913, As Interpreted, Violates Due Process As It Is Arbitrary And Capricious 6

Point III - A Tenured Female Teacher's Fundamental Right To Privacy Is Violated Where No Compelling State Interest Is Served By Requiring The Respondent To Undergo Physical Examination By A Male Medical Inspector.....8

Conclusion 10

CITATIONS

Page

Allen V. McCurry, 449 U'S' 90, 101 S.Ct. 441, 66 L Ed 2d (1980).....3, 4, 6

Board of Regents v. Roth, 408 U.S. 564, 577 (1972).....8

Cromwell v. County of Sac, 94 U.S. 351, 24 L Ed 2d 547 (1877).....3

Davis v. Hubbard, 506 F. Supp. 915 (N.D.Ohio, 1988).....8

Doe v. Bolton, 410 U.S.179, 93 S Ct 739, 35 L Ed 2d 147 (1973).....8

Ferguson v. Skrupa, 372 U.S. 726, 733 (1963).....6

Forts v. Wade, 471 F.Supp. 1095 (S.D.N.Y. 1978).....9

Graves v. Oligiati, 550 F.2d 1327 (ed Cir. 1977).....5

Griswold v. Connecticut, 381 U.S. 479, 85 S Ct 1678, 14 l Ed 2d 510 (1965).....8,9

Hudson v. Goodlander, 494 F. Supp. 890 (D.C. Md. 1980).....9

Lombard v. Board of Education, 502 F.2d 631 (1974), cert. denied 420 U.S. 976, 95 S.Ct. 1400, 43 L Ed 2d 656 (1975).....4, 5

McNeese v. Board of Education, 373 U.S. 668, 10 L Ed 2d 622, 83 S Ct 1433 (1963).....4

Matter of Grasso, 4 Educ. Dept. Rep. 360 (1976), reh. den. 15 Ed. Dept. Rep. 520 (1976).....7

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 l. Ed 2d 492 (1961).....4, 5

Page

Mitchell v. National Broadcasting Corp., 553 F.2d 269 (1981) 4

Newman v. Board of Education, 508 F.2d 277 (2d Cir. 1975) 5

Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978) 6

Paris Adult Theater I v. Slaton, 413 U.S. 49, 93 S Ct 2628, 37 L Ed 2d 446 (1975) 9

Perry v. Sindermahn, 408 U.S. 593 (1972) 8

Phelps v. Board of Education, 300 U.S. 319, 322 1937 6

Plano v. Baker, 504 F. 2d 595 (2d Cir. 1974) 4

Roe v. Wade, 410 U.S. 223, 93 S Ct 705, 35 L Ed 2d 174 (1972) 8

Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L Ed 2d 505 (1974) 4

United States v. 12-200 Ft. Reels of Film, 413 U.S. 123, 93 S Ct 2665, 37 L Ed 2d 500 (1972) 9

York v. Story, 324 F.2d 450 (9th Cir. 1963) 9

United States Constitution

First Amendment 8

Third Amendment 8

Fourth Amendment 8

Fifth Amendment 8

Ninth Amendment 8

Federal Statutes

28 U.S.C. Sec. 1652 6

42 U.S. Sec. 1983 2

New York Statutes

Education Law Sec. 913 6

Education Law 3012, ... 8

Miscellaneous

State School Board Association Memo

State School Board Association Memorandum in Support of Proposed Sec. 913, New York Legislative Annual, 135 (1952) 7

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v. *Petitioners,*

LORRAINE GARGIUL,

Respondent.

PLEA

Respondent respectfully prays that the request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 29, 1983 be denied.

QUESTIONS PRESENTED

1. Whether principles of res judicata bar a claim where no final judgment on the merits of the case was obtained from a Court of competent jurisdiction.

2. Whether certiorari should be denied because New York Education Law Sec. 913, as interpreted, violates substantive due process as it is arbitrary and capricious.

3. Whether a tenured female teacher's fundamental right to privacy is violated where no compelling state interest is served by requiring the Respondent to undergo physical examination by a male medical inspector.

STATEMENT OF THE CASE

Respondent, a tenured female kindergarten teacher employed by the Petitioners, was ordered to submit to a physical examination prior to returning to her regular duties after she took extended sick leave because of a back ailment. Petitioners cited New York State Education Law Sec.913 as the authority for the order. Petitioners selected Paul Day, M.D. a pediatrician, as the medical inspector to conduct the physical survey regarding Respondent's orthopedic condition. Respondent declined to be examined by this non-qualified physician explaining that she had always gone to women doctors and that it was against her "creed" to be examined by a male physician. She proposed, in the alternative, that any physical examination be completed by a female board certified specialist in back defects selected by the Petitioners or approved by a County Medical Society. Respondent even offered to absorb the expense, with no cost to be incurred by the Petitioners. Respondent was suspended, and subsequently dismissed for refusing to be examined by the male school district pediatrician.

Constitutional issues, including her right to substantive due process and her right to privacy, raised in state administrative and judicial proceedings, were not finally determined. The 42 U.S.C. Sec. 1983 action, commenced early in the course of the state proceedings, was held in abeyance.

The United States Court of Appeals for the Second Circuit concluded that, as the Respondent never directly appealed the adverse (New York State) administrative determination and that, as the state court never reviewed the administrative legal determination, the doctrine of res judicata is not applicable to the instant case. *Gargiul v. Thompkins et al*, 704 F.2d 661, 666 and 667 (1983).

Moreover, the Court concluded that the Petitioners' actions with respect to Respondent, must be considered arbitrary and reversed a U.S. District Court judgment of dismissal.

REASONS FOR DENYING THE WRIT

POINT I

PRINCIPLES OF RES JUDICATA DO NOT BAR A CLAIM WHERE NO FINAL JUDGMENT ON THE MERITS OF THE CASE WAS OBTAINED FROM A COURT OF COMPETENT JURISDICTION.

Whether or not the principles of res judicata apply where issues could have been raised and determined in earlier proceedings has not been resolved by the Court. *Allen v. McCurry,* 499 U.S. 90, 101 S Ct. 441, 66 L Ed 2d (1980); *Cromwell v. County of Sac,* 94 U.S. 351, 24 L Ed 2d 547 (1877). However in the instant case, the issue was raised in the administrative hearing but no final judgment was made, as question is not reached by the state courts. The New York Appellate Court ruled:

> ". . .the several constitutional issues that the petitioner has raised. . .are not reached and determined in this case. . ."

Gargiul v. Board of Education II, 69 AD 2d 986, 416 NYS 2d 119 (4th Dept. 1979).

Where a constitutional issued is raised in state court but not determined there, to bar Respondent from raising that issue in federal court under res judicata principles would completely foreclose Respondent from final judgment on the merits of the case. *Allen v. McCurry, supra,* held that res judicata principles do apply in cases brought under 42 U.S.C. Sec.1983 when the issues were actually raised and litigated to a final judgment in earlier state court proceedings.

In a case involving civil rights claims, a proceeding before a Commissioner is not an appropriate forum

for resolving constitutional disputes. Constitutional issues ". . .lie within the expertise of courts, not the expertise of administrators." *Plano v. Baker,* 504 F 2d 595, 599 (1974). State or federal court is the only appropriate forum under Sec.1983. Otherwise, in the instant case, Respondent would be denied her day in court, a denial particularly of concern where constitutional civil rights issues are involved. Such a denial is inappropriate in light of the Court's holding.

In *Monroe v. Pape,* 365 U.S. 167, 81 S Ct 473, 5 L Ed 2d 492 (1961) which involved a federal civil rights claim, it is stated, "The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one invoked." The Court affirmed this holding in a later case, stating that ". . .Sec.1983 gives a litigant an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process. . ." *McNeese v. Board of Education,* 373 U.S. 668, 83 S Ct 1433, 10 L Ed 2d 622 (1963). The Court, in *Steffel v. Thompson,* 415 U.S. 452, 94 S Ct 1209, 39 L Ed 2d 505 (1974), stated "When federal claims are premised on 42 U.S.C. 1983,. . .we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson, supra,* at 472.

The Second Circuit Court of Appeals in *Mitchell v. National Broadcasting Co.,* 533 F. 2d 265 (2d Cir. 1977), followed the reasoning of the Supreme Court in holding that res judicata attached in an administrative hearing only at the point when the claimant's appeal to New York courts was reviewed by those Courts. Res judicata has been held to attach". . .when a claimant crosses the line between state agency and state judicial proceedings. "*Mitchell v. National Broadcasting Co., supra,* at 276. In the instant case, ". . .it seems clear that if the appellant actively asserted his constitutional claim in the state court, he could not get a writ of certiorari from the non-constitutional judgment of the court." *Lombard v. Board of Education,* 502 F.2d

631 (1975), cert. denied 420 U.S. 976, 95 S Ct 1400, 43 L Ed 2d 656 (1975).

In *Gargiul v. Board of Education II,* 698 F 2d 986, 416 NYS 2d 119 (4th Dept. 1979), the New York State Appellate Division affirmed the Commissioner of Education's suspension of Respondent, based on the statutory right of the members of the Board of Education to order an employee to submit to a medical examination under Education Law Sec.913. Respondent offered to undergo an examination by a qualified female physician at her own expense. Therefore, the New York State Appellate Division did not actually rule on viable alternatives presented by respondent. Hence, Respondent here did not obtain even a non-constitutional final judgment dealing with the issues implicit in the case.

Finally, the Second Circuit Court of Appeals has held that where a claimant proceeds under Sec.1983, prior state proceedings did not bar subsequent federal court action. *Lombard v. Board of Education, supra.* The Court in *Lombard* reasoned that ". . .it is not consistent with *Monroe v. Pape, supra,* to put appellant in a position where he cannot raise the constitutional question. . .either to the state court or to the federal court, i.e. to any court. . .". Where Respondent attempted to raise the Sec.1983 claim in state court, to bar her from federal court, again, would deny her a day in court. Subsequent Second Circuit cases have affirmed this policy of allowing a civil rights claimaint a day in court. *Newman v. Board of Education,* 508 F.2d 277 (2d Cir. 1975), *Ornstein v. Regan,* 574 F.2d 277 (2d Cir. 1975), *Graves v. Oligiati,* 550 F.2d Cir. 1977).

Where Respondent raised her Sec.1983 claim in state-court, but was denied a final judgment on the merits, to bar Respondent from pursuit of her claim in federal court under principles of res judicata is inequitable and contrary to previous Supreme Court holdings and enunciations of policy in civil rights cases. Since the civil rights issue was raised by the Respondent, but was not litigated to a final judgment on the merits

in state court, the instant case does not fall under the enunciation of the *Allen* v. *McCurry* test for the application of res judicata. Clearly, there is a special federal interest in affording civil rights claimants the opportunity for a final judgment on the merits of these constitutional issues. Therefore, the Respondent is entitled to her day in court.

POINT II

CERTIORARI SHOULD BE DENIED BECAUSE NEW YORK EDUCATION LAW SEC.913, AS INTERPRETED, VIOLATES SUBSTANTIVE DUE PROCESS AS IT IS ARBITRARY AND CAPRICIOUS.

The rules of Decision Act, 28 U.S.C. Sec.1652, states that: "...the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." But where the state law is unconstitutional, the case is not one in which the Rules of Decision Act apply. The Court therefore is not bound to apply that state law. *Phelps* v. *Board of Education,* 300 U.S. 319, 322 (1937).

The test for constitutionality of a law is whether or not the goverment acts ". . .capriciously and arbitrarily to make rules and laws that do not bear a rational relationship to a legitimate governmental purpose." *Ferguson* v. *Skrupa,* 372 U.S. 726, 733 (1976). Under this test, the governmental act is scrutinized to determine if the act is reasonably related to the purpose of the law. If the act is not rationally related to the purpose of the law, the law is unconstitutional.

New York Educational Law Sec.913 provides that:

"In order to safeguard the health of children attending the public schools, the Board of Education. . .shall be empowered to require any person employed by the Board of Education. . .to submit to a medical examination by a physician of his choice or school medical inspector. . ."

The New York State Commissioner of Education administratively interpreted the statute to mean that either type of examination, that is, by a physician of his choice or the school medical inspector, might be required by the Board of Education. *Matter of Grasso,* 4 Educ. Dept. Rep. 174 (1965). The purpose of this statute is to insure that ". . .school children receive instruction from competent, qualified teachers who are not incapacitated. . .physically. . ."*State School Board Association Memorandum in Support of Proposed* Sec.913, New York Legislative Annual, 135 (1952).

The right of the Board to obtain a medical examination of teachers under Sec.913 is not disputed. Moreover, the reason for obtaining an independent medical appraisal appears to rationally relate to the purpose of safeguarding the welfare of school children is not disputed. But where a female tenured teacher has a strong interest in obtaining a medical examination from a female physician, and where that teacher has proposed several alternatives, each of which would provide an independant examination, the suspension and dismissal of that tenured teacher with the denial of status, pay and other benefits, is an arbitrary and capricious governmental action not reasonably related to the welfare of the children.

Where a member of a school board refuses to allow a female teacher to be examined at her own expense by any female Board-Certified orthopedic specialist selected by the members of the Board of Education or approved by a county medical society, action of the member of the Board of Education in allowing only an examination by the school district medical inspector, who happens to be a pediatrician in the instant case, is clearly arbitrary and capricious.

A reasonable alternative related to the purpose of Sec.913 and governmental efficiency is not afforded by requiring a tenured teacher to attend a medical examination in which a "hands-on" inspection may be required, where a reasonable alternative is available. A tenured teacher has a sufficient property interest

for constitutional due process to apply. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Under New York Education Law Sec.3012 a teacher is entitled to a hearing after suspension for insubordination or other cause, creating a protectable property interest under New York State Law. Since the Petitioners acted arbitrarily and capriciously under Sec.913 in the instant case, the Rules of Decision Act does not apply.

POINT III

A TENURED FEMALE TEACHER'S FUNDAMENTAL RIGHT TO PRIVACY IS VIOLATED WHERE NO COMPELLING STATE INTEREST IS SERVED BY REQUIRING THE RESPONDENT TO UNDERGO PHYSICAL EXAMINATION BY A MALE MEDICAL INSPECTOR.

Violations of substantive due process occur when no compelling state interest justifies an infringement of the fundamental right to privacy. While the United States Constitution makes no specific mention of a right ot privacy, a general constitutional right to privacy does exist. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The zones of privacy were held to arise out of guarantees in the First, Third, Fourth, Fifth, and Ninth Amendments. In *Roe* v. *Wade*, 152 U.S. 113 (1972), the Court stated that those rights ". . .implicit in the concept of ordered liberty are included under the guarantee of personal privacy." *Roe* v. *Wade*, 410 U.S. at 152.

Protection afforded to the right of privacy stretches back to the Magna Carta. See *Davis* v. *Hubbard*, 506 F.Supp. 915, 931 (N.D. Ohio 1980). The right to privacy is currently recognized and protected in several different contexts. For example, "the right to privacy has no more conspicuous place than the physician-patient relationship. . ." *Doe* v. *Bolton*, 410 U.S. 179 219 (1973). It has been recognized that the citizen is entitled to receive constitutional protection for the "intimate medical problems of family, marriage, and motherhood."

United States v. *12-200 Ft. Reels of Film*, 413 U.S. 123, 127 N.4 (1972). And, the right to privacy is concerned with ". . .protected intimate relationships and such protected privacy extends to the doctor's office. . ." *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1975). The physician-patient context is related to the sphere of the family and marital relationships. Courts have traditionally been reluctant to infringe on ". . .a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage." *Griswold* v. *Connecticut, supra*, at 491.

Additionally, there are the protections afforded those imprisoned or in similar circumstances of governmental control. Prisoners and others under the controls of police have been held to have rights of bodily integrity. Where individuals are forced to reveal their bodies, there has been found the right not to do so before members of the opposite sex. Violations of the right to privacy are found where both male and female prisioners have been or could have been seen unclothed by prison guards of the opposite gender. *Forts* v. *Ward*, 471 F.Supp. 1095 (S.D.N.Y. 1978), *Hudson* v. *Goodlander*, 494 F. Supp. 890 (D.C. Md. 1980). The Court of Appeals for the Ninth Circuit sustained an action under 42 U.S.C. Sec.1983 for invasion of privacy where a woman was photographed nude in the presence of male police officers. *York* v. *Story*, 324 F.2d 450 (9th Cir. 1963). In other words, where the government does have a right to intrude on the right to privacy the individual is procedurally well protected.

Where the state interest in the governmental action taken is not compelling, the protected constitutional right is violated.

The State argues that it has the responsibility to protect the health of its school children which, in turn, gives it the right to compel a physical examination of its teachers. However, in this case the plaintiff has agreed to be examined by and to pay for any qualified female physician chosen by the Petitioners.

The State's interest would in no way be compromised by permitting the Respondent to see a female physician, thereby allowing for the exercise of her fundamental right to privacy. As a consequence, the State's interest (through the Petitioner, a lesser political subdivision) in requiring the Respondent to be examined by a male inspector falls well below the "compelling interest" standard.

Therefore, the Respondent's fundamental right to privacy is violated as the Petitioners had no compelling interest in requiring Respondent to undergo medical examination by a male medical inspector.

CONCLUSION

For these reasons, a writ of certiorari should be denied in this case.

Respectfully submitted,

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